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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO**

ANIBAL RODRIQUEZ, *et al.*, individually and on  
behalf of all other similarly situated,

Plaintiffs,

vs.

GOOGLE LLC,

Defendant.

Case No. 3:20-CV-04688

**DEFENDANT GOOGLE LLC'S  
REQUEST FOR JUDICIAL NOTICE IN  
SUPPORT OF MOTION TO DISMISS  
FIRST AMENDED COMPLAINT  
PURSUANT TO FED. R. CIV. P.  
12(B)(6)**

Court: Courtroom 3 – 17th Floor  
Date: February 25, 2021  
Time: 1:30 p.m.

Judge: Hon. Richard Seeborg

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE THAT** pursuant to Federal Rule of Evidence (“Rule”) 201, Defendant Google LLC hereby respectfully request that the Court take judicial notice of the following materials in support of its Motion to Dismiss Plaintiffs’ First Amended Complaint, filed concurrently herewith.

1. Google Analytics for Firebase Terms of Service web [page](#), with an effective date of April 17, 2019, along with the publicly-accessible archive of each of the previous versions, attached as **Exhibit 1** to the Declaration of Andrew Rope (“Rope Declaration”) in support of Google’s Motion to Dismiss the First Amended Complaint;

2. Google Analytics for Firebase Use Policy web [page](#), along with the publicly-accessible archive of each of the previous versions, with an effective date of December 20, 2019, attached as **Exhibit 2** to the Rope Declaration;

3. Alibaba’s Terms of Use web [page](#), with an effective date of September 8, 2020, along with the previous version of the Terms of Use, attached as **Exhibit A(1)-(2)** to the Declaration of Jayvan E. Mitchell (“Mitchell Declaration”). The current Alibaba Terms of Use policy is substantively the same as the previous version attached as Exhibit A(2) to the Mitchell Declaration;

4. Alibaba’s Privacy Policy web [page](#), with an effective date of September 14, 2020, along with a previous version of the Privacy Policy, attached as **Exhibit B(1)-(2)** to the Mitchell Declaration. The current Alibaba Privacy Policy is substantively the same as the previous version attached as Exhibit B(2) in the Mitchell Declaration;

5. Lyft’s Terms of Service web [page](#), with an effective date of November 27, 2019, along with the previous version of the Terms of Service, attached as **Exhibit C(1)-(2)** to the Mitchell Declaration. The current Lyft Terms of Service is substantively the same as the previous version attached as Exhibit C(2) to the Mitchell Declaration;

6. Lyft’s Privacy Policy web [page](#), with an effective date of September 14, 2020, along with a previous version of the Privacy Policy, attached as **Exhibit D(1)-(2)** to the Mitchell Declaration.

1 The current Lyft Privacy Policy is substantively the same as the previous version attached as  
2 Exhibit D(2) to the Mitchell Declaration;

3 7. The Economist's Cookie Policy web [page](#), with an effective date of October 5, 2020, along  
4 with a previous version of the Cookie Policy, attached as **Exhibit E(1)-(2)** to the Mitchell  
5 Declaration. The Economist's Cookie Policy is substantively the same as the previous version  
6 attached as Exhibit E(2) to the Mitchell Declaration;

7 8. The New York Times' Cookie Policy web [page](#), with an effective date of October 10, 2020,  
8 along with a previous version of the Cookie Policy, attached as **Exhibit F(1)-(2)** to the Mitchell  
9 Declaration. The New York Times' Cookie Policy is substantively the same as the previous  
10 version attached as Exhibit F(2) to the Mitchell Declaration;

11 9. The Wattpad Privacy Policy web [page](#), with an effective date of May 25, 2018 attached as  
12 **Exhibit G** to the Mitchell Declaration;

13 10. The Google Analytics Opt-Out Browser Add-on web [page](#), along with a previous version,  
14 attached as **Exhibit H(1)-(2)** to the Mitchell Declaration. The Google Analytics Opt-Out Browser  
15 Add-on web page is substantively the same as the previous version attached as Exhibit H(2) to the  
16 Mitchell Declaration;

17 11. The NPR Privacy Policy web [page](#), with an effective date of November 17, 2020, along  
18 with a previous version of the Privacy Policy, attached as **Exhibit I(1)-(2)** to the Mitchell  
19 Declaration. The NPR Privacy Policy is substantively the same as the previous version attached  
20 as Exhibit I(2) to the Mitchell Declaration;

21 12. The Duolingo Privacy Policy web [page](#), with an effective date of October 11, 2018, along  
22 with a previous version of the Privacy Policy, attached as **Exhibit J(1)-(2)** to the Mitchell  
23 Declaration. The Duolingo Privacy Policy is substantively the same as the previous version  
24 attached as Exhibit J(2) to the Mitchell Declaration;

25 13. The Trivago Privacy Policy web [page](#), with an effective date of September 2020, along with  
26 a previous version of the Privacy Policy, attached as **Exhibit K(1)-(2)** to the Mitchell Declaration.  
27 The Trivago Privacy Policy is substantively the same as the previous version attached as Exhibit  
28

1 K(2) to the Mitchell Declaration;

2 14. The Venmo Privacy Policy web [page](#), with an effective date of October 5, 2020, along with  
3 a previous version of the Privacy Policy, attached as **Exhibit L(1)-(2)** to the Mitchell Declaration.  
4 The Venmo Privacy Policy is substantively the same as the previous version attached as Exhibit  
5 L(2) to the Mitchell Declaration.

6 15. The Firebase Documentation web [page](#) titled “Set a User ID,” with an effective date of  
7 November 10, 2020, attached as **Exhibit M** to the Mitchell Declaration.

8 16. The Google Privacy & Terms web [page](#) titled “How Google Uses Information from Sites or  
9 Apps that Use Our Services,” attached as **Exhibit N** to the Mitchell Declaration.

10 17. The Firebase Documentation web [page](#) titled “Configure Analytics Data Collection and  
11 Usage,” attached as **Exhibit O** to the Mitchell Declaration.

## 12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 The documents listed above are properly subject to judicial notice, and the Court should  
14 consider them when ruling on Google’s Motion to Dismiss Plaintiffs’ First Amended Complaint.

### 15 **I. LEGAL STANDARD**

16 When ruling on a motion to dismiss, a court may consider material that is appropriate for  
17 judicial notice. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *Khoja v.*  
18 *Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018). Courts may take judicial notice  
19 of facts that are “not subject to reasonable dispute.” Fed. R. Evid. 201(b). Facts are not subject  
20 to reasonable dispute when they (1) are “generally known within the trial court’s territorial  
21 jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot  
22 reasonably be questioned.” *Id.*; see *Khoja*, 899 F.3d at 999, 1001; accord *United States v. Ritchie*,  
23 342 F.3d 903, 908 (9th Cir. 2003).

24 Courts in this district recognize that “as a general matter, websites and their contents may  
25 be proper subjects for judicial notice” if the party requesting notice provides the court with a copy  
26 of the specific web page. *Caldwell v. Caldwell*, No. 05-cv-4166, 2006 WL 618511, at \*4 (N.D.  
27 Cal. Mar. 13, 2006); see also *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1190, 1205 (N.D. Cal.  
28

2014) (taking judicial notice of web pages); *Kinderstart.com, LLC v. Google, Inc.*, No. 06-cv-2057 JF (RS), 2007 WL 831806, at \*21 n.20 (N.D. Cal. Mar. 16, 2007) (taking judicial notice of a web page printout).

## II. THE COURT SHOULD TAKE JUDICIAL NOTICE OF THE EXHIBITS

### A. The exhibits are publicly available documents not subject to reasonable dispute, and are relied upon by Plaintiffs' First Amended Complaint.

Exhibits 1 and 2 to the Rope Declaration and Exhibits A through M to the Mitchell declaration comprise various privacy and terms of use policies, including Alibaba's, Lyft's, and Google's Analytics for Firebase Terms of Use and Service, Google's Opt-Out Disclosure, Firebase policy entitled "Set a User ID," along with the Privacy Policies of Alibaba, NPR One, Duolingo, Trivago, New York Times, Economist, Venmo, Wattpad, and Lyft. The Court can take judicial notice of these documents because they are publicly available and are not subject to reasonable dispute. *See, e.g., Caldwell*, 2006 WL 618511, at \*4.

Indeed, numerous courts in this district have recognized terms of service and privacy policies as judicially noticeable. *See Gonzales v. Uber Techs., Inc.*, 305 F. Supp. 3d 1078, 1094 (N.D. Cal. 2018), *on reconsideration*, No. 17-CV-02264-JSC, 2018 WL 3068248 (N.D. Cal. June 21, 2018) (taking judicial notice of Lyft's terms of service); *Opperman v. Path, Inc.*, 84 F. Supp. 3d 962, 976 (N.D. Cal. 2015) (taking judicial notice of the Software License Agreements, Privacy Policy, iOS Human Interface Guidelines, and Apple's App Store Approval Process instructions "as they are publicly available, standard documents that are capable of ready and accurate determination."); *Opperman v. Path, Inc.*, 205 F. Supp. 3d 1064, 1070 (N.D. Cal. 2016) (taking judicial notice of several news articles from various sources); *Trudeau v. Google LLC*, No. 18-CV-00947-BLF, 2018 WL 4846796, at \*4 (N.D. Cal. Oct. 3, 2018) (taking judicial notice of Google's Terms of Service); *Matera v. Google Inc.*, No. 15-CV-04062-LHK, 2016 WL 5339806, at \*7 (N.D. Cal. Sept. 23, 2016) (taking judicial notice of Google's Terms of Service and privacy policy); *In re Google Inc. Gmail Litig.*, No. 13-MD-02430-LHK, 2013 WL 5423918, at \*7 (N.D. Cal. Sept. 26, 2013) (taking judicial notice of Google's Terms of Service and privacy policies); *In*

1 *re Google, Inc. Privacy Policy Litig.*, No. C 12-01382 PSG, 2012 WL 6738343, at \*3–4 (N.D.  
2 Cal. Dec. 28, 2012) (taking judicial notice of Google’s “past and present Terms of Service and  
3 Privacy Policies” as matters of public record).

4 **B. The incorporation by reference doctrine also applies because Plaintiffs’ claims**  
5 **depend on and incorporate the terms of the relevant agreements.**

6 In addition, these documents are properly before the Court under the related doctrine of  
7 incorporation by reference. Plaintiffs’ claims necessarily depend on the terms of the agreement  
8 between Google and the apps that use Google Analytics for Firebase (“GA for Firebase”). *See,*  
9 *e.g.*, First Amend. Compl. ¶¶ 43, 44. Similarly, Plaintiffs’ claims, which arose while they were  
10 using the Lyft, Alibaba, Economist, New York Times, Wattpad, NPR One, Venmo, Duolingo,  
11 Trivago apps (First Amend. Compl. ¶ 209), depend on the argument that they never authorized  
12 Google to access the data that app developers chose to collect by incorporating GA for Firebase  
13 into their apps. *See* First Amend. Compl. ¶ 224 (alleging Plaintiffs did not authorize collection of  
14 data).

15 The Ninth Circuit has repeatedly recognized that the incorporation-by-reference doctrine  
16 applies in these circumstances. In *Knievel*, the court extended the doctrine where “the plaintiff’s  
17 claim depend[ed] on the contents of a document, the defendant attache[d] the document to its  
18 motion to dismiss, and the parties [did] not dispute the authenticity of the document, even though  
19 the plaintiff [did] not explicitly allege the contents of that document in the complaint.” *Knievel v.*  
20 *ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005); *see also Khoja*, 899 F.3d at 1002–03 (holding that the  
21 district court properly incorporated web articles, market reports, and blog posts that formed the  
22 basis of the plaintiff’s claims). This doctrine applies with “equal force to internet pages,” *Knievel*,  
23 393 F.3d at 1076, and exists in part to prevent “artful pleading by plaintiffs’ who “select[] only  
24 portions of documents that support their claims, while omitting portions of those very documents  
25 that weaken—or doom—their claims,” *Khoja*, 899 F.3d at 1002–03; *see also Knievel*, 393 F.3d at  
26 1076 (reasoning that the doctrine applies to online materials, because “[j]ust as a reader must  
27 absorb a printed statement in the context of the media in which it appears, a computer user  
28

Given the undisputed nature of the above referenced documents, and Plaintiffs' reliance on them for the claims alleged, the Court can properly consider the various Terms of Use and Service along with Privacy Policies under either Rule 201(b) or the incorporation by reference doctrine.

For the foregoing reasons, Google respectfully requests that the Court take judicial notice of Exhibits 1 and 2 to the Rope Declaration and Exhibits A through M to the Mitchell Declaration.

Date: December 17, 2020

Attorneys for Defendant  
Google LLC